

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: 9075/13

In the matter between:

DESMOND MASHIGO

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

MUDAU AJ:

[1] This is an action for damages consequent upon an alleged unlawful arrest and detention. It is common cause that the plaintiff was arrested without a warrant by the employees of the defendant, acting within the course and

scope of their employment with the South African Police Service (“SAPS”), on 14 November 2012 whilst travelling on a train. The plaintiff was detained at the Germiston Police Station. He was held in custody overnight and taken to the magistrate’s court cells the following day. He was set free in the afternoon without an appearance. He was never charged with any crime. The merits of the case turn on whether the arrest and detention was lawful.

- [2] This court is called upon in this trial to determine both the plaintiff’s claims on the merits as well as the quantum of damages.
- [3] It is common cause on pleadings that on the day in question the plaintiff was arrested by members of SAPS for the offence of travelling on a train without a ticket. Thereafter, he was taken to the Germiston police station. He was detained at about 07h00 until his release on 15 November 2012 at about 13:00 hours.
- [4] The defendant had the onus to begin and prove the justification for the arrest on a balance of probabilities. (See Minister of Law and Order and Another v Dempsey¹ and Zealand v Minister of Justice and Constitutional Development)².
- [5] The police officer on duty at the Germiston SAPS charge office, Constable Billy Matlala (“Matlala”), testified that he was on duty when a group of about 20 people were brought to the police station. He was told that the group of people had been arrested by the police and security guards for travelling on a train without tickets. During cross-examination, Matlala conceded that he had

¹ 1988 (3) SA 19 (A) at 38B-C

² 2008 (2) SACR 1 (CC)

received no written statement from any of the officers who carried out the actual arrest of the plaintiff in the train. He relied on their oral report.

[6] The evidence of the plaintiff is briefly as follows. On the day of his arrest, his car experienced mechanical problems. He had no choice but to take a train ride to Alrode where he worked as a truck controller. A friend of his dropped him off at the train station shortly before 06h00. There was no cashier or ticket examiner on duty to sell him a ticket. As he was late for work, he could not wait for a cashier. He proceeded and boarded a train which had stopped at the station. He intended to purchase a ticket after he had boarded. He testified that he had money to pay for the ticket. The plaintiff further testified that he was not given an opportunity to purchase a ticket and was told to keep quiet.

[7] There were other people inside the train including some of his colleagues. While he was travelling, a ticket examiner and the police approached him. They asked him for his ticket. He had none. He was asked to stand up, which he did. He was promptly arrested and handcuffed. When he tried to give an explanation, they did not want to entertain it but told him that he could explain in court. He was not the only one arrested. At the Germiston train station, they were made to disembark and taken into police vans. Thereafter he was taken to the Germiston police station where he was detained. He had to sleep on a cement floor. There was an open toilet which was not only dirty, but also smelly. As indicated above, the next day he was taken to the courthouse cells and was eventually released around 14h00 without an appearance before the magistrate.

[8] During cross-examination, he testified that he knew it was an offence to board a train without a valid ticket. However, this did not bother him as he thought he could always buy it once inside the train.

[9] The Bill of Rights, in our Constitution,³ enshrines in section 12 (1) that “everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial.
- (c) ...
- (d)”

The protection of section 12 (1) of the Constitution is fundamental in governing relationships between the state and a citizen (including foreigners, asylum seekers and economic migrants amongst us). This is intended primarily to strike a balance between public interests in protection against crime and individual liberties and freedoms on the other side.

[10] Section 12 of schedule 1 of the Legal Succession to the South African Transport Act⁴ reads as follows:

“A person who-

- (s) is present in a vehicle under the control of the Company or the Corporation, as the case may be, and refuses, upon being requested to do so by an authorized official of the Company or the Corporation, as the case may be, to hand over a valid ticket, letter of authority or **the**

³ Act 108 of 1996

⁴ Act 9 of 1989

applicable cash amount for the actual journey being undertaken;

("emphasis added")...

(u) is present on station premises under the control of the Company or the Corporation, as the case may be, and who-

(i) intends to travel by train from such station premises; or

(ii) has completed a train journey at such station premises,

and refuses, upon being requested to do so by an authorised employee of the Company or the Corporation, as the case may be, to produce or present a relevant ticket, a letter of authority, **cash or other acceptable means of payment for such journey**, ("emphasis added") shall be guilty of an offence and on conviction any competent court may impose, in its discretion, a fine or imprisonment, or a fine and imprisonment, or any suitable punishment within its jurisdiction."

[11] A passenger in a train is obliged upon being requested to do so to hand over a valid ticket, letter of authority or the applicable cash amount for the actual journey being undertaken. It is therefore clear from a proper reading of the relevant section that, to constitute an offence, the plaintiff must either have failed to hand over a valid ticket, an applicable letter of authority or the cash amount for the journey undertaken upon request. In this case however, the unchallenged evidence remains that he was not given the opportunity to

present the cash amount for the journey he undertook inside the train or later at the police station.

[12] In argument, it was contended on behalf of the defendant that the arrest of the plaintiff was justified in terms of section 40(1) (a) of the Criminal Procedure Act 51 of 1977 (the Act) as he boarded a train without a ticket. Section 40 (1) (a) relied upon provides that:

“(1) A peace officer may without a warrant arrest any person-
(a) who commits or attempts to commit an offence in his presence”.

An arrest entails the exercise of discretion. There is no obligation on the part of the police to arrest and detain every person suspected of having committed an offence (Minister of Safety and Security v Sekhoto and another)⁵.

[13] The jurisdictional facts that are necessary for an arrest under s 40 (1) (a) are the following:

1. the arrestor must be a peace officer;
2. an offence must have been committed or there must have been an attempt to commit an offence; and
3. the offence or attempted offence must be committed in his or her presence.

[14] It is an established principle of our law that a decision by an arresting officer to arrest and detain is a drastic one, which invades the arrestee's right to liberty and movement as guaranteed in our Constitution. There is a duty on the part of the police in the exercise of this discretion to arrest and detain, that

⁵ 2011 (1) SACR 315 (SCA)

they be guided by enshrined constitutional principles and thus be careful not to infringe upon the rights and liberties of individuals. In Louw v Minister of Safety and Security⁶, Bertelsmann J said:

“An arrest is a drastic interference with the rights of the individual to freedom of movement and to dignity. In the present past, several statements made by our Courts and academic commentators have underlined that an arrest should only be the last resort as a means of producing an accused person or a suspect in court – Minister of Correctional Services v Tobani 2003 (5) SA 126 (E) [2001] 1 All SA 370 at 371f (All SA):

‘So fundamental is the right to personal liberty that the lawfulness or otherwise of a person’s detention must be objectively justifiable regardless ... even of whether or not he was aware of the wrongful nature of the detention.’”

[15] For the arrest to be lawful it has to be warranted by law. In this case Matlala, who detained the plaintiff, had no personal knowledge of the alleged criminal conduct. Neither did he ask the plaintiff if he was willing to pay for the train ticket as the law provides. The risk of unlawfully depriving the plaintiff’s right to liberty was always there. (see also *Minister of Safety and Security v Glisson*⁷).

[16] Besides, the offence in respect of which the plaintiff was arrested is not amongst the list of offences referred to in terms of section 40(1) (b) of the Act since there is provision for a fine or a term of imprisonment in his case. Since

⁶ 2006 (2) SACR 178 (T) at 185B-C

⁷ 2007 (1) SACR 131 (E) at 134D-E

the plaintiff was not afforded an opportunity to pay for the train ticket, I find that there was no lawful arrest. He was arbitrarily arrested and for no sound reasons. Not only was the plaintiff unlawfully arrested, so was his detention until his release the next day.

[16] It remains to deal with the question of quantum. It is trite that each case has to be dealt with on its own peculiar merits regarding quantum. From both sides, I have been referred to in number of cases by counsel in this regard most of which I am aware of. In Mvu v Minister of Safety and Security⁸, the plaintiff, an inspector in the SAPS, was detained overnight in the police cell but was released on warning the following day. He was awarded R30 000-00 as damages. In Minister of Safety and Security v Seymour⁹ an award of R500 000 for five days of detention was reduced to R90 000-00 on appeal. In Minister of Safety and Security v Tyulu¹⁰ an amount of R50, 000-00 as damages was further reduced to R15, 000-00.

[17] In this case, the plaintiff, who is a family man, was detained under circumstances already dealt with in para 7 above. The fact that he was arrested in the presence of his colleagues and later detained, must have humiliated him. However, it cannot be said that the arrest was carried out for an improper motive as the plaintiff admitted that he had no train ticket. Counsel for the plaintiff had in closing submissions, argued that an amount of R65 000-00 would be adequate as an award. In my view, a fair and just award under the circumstances for the plaintiff's damages flowing from his unlawful

⁸ 2009 (6) SA 82 (GSJ)

⁹ 2006 (6) SA 320 (SCA)

¹⁰ 2009 (5) SA 85 (SCA)

arrest and detention is R30, 000-00. There is no reason why the question of costs should not follow the result. The amount suggested on behalf of the plaintiff brings this matter within the purview of the magistrates' court's jurisdiction.

[18] In the result the following order is made:

The defendant is ordered to pay the plaintiff the sum of:

1. R30, 000-00.
2. Interest on the aforesaid sum at the rate of 9% from the date of judgment to date of payment.
3. Costs of suit on the appropriate magistrate's court scale.

T P Mudau

**Acting Judge of the High Court,
Gauteng Local Division
Johannesburg**

Appearances

For the Plaintiff
Instructed By
For the Defendant
Instructed By
Date of hearing
Date of judgment

B L Mzamo
Mzamo Attorneys
I S Ngwetjana
State Attorney
5 - 6 August 2015
11 September 2015